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No. 563

In the Supreme Court of the United States

OCTOBER TERM, 1970

UNIVERSAL CIGAR CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5A–6A) is not yet officially reported. The Board's decision and order (Pet. App. 8A–32A) are reported at 173 NLRB No. 129.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1A–4A) was entered on June 4, 1970, and a petition for rehearing was denied on July 7, 1970 (Pet. App. 6A). The petition for a writ of certiorari was filed

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on August 20, 1970. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that the company (1) failed to recall an employee because of her union adherence, and (2) coercively interrogated an employee about the union's strength and the union adherence of other employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set out at pp. 32A–33A of the Appendix to the petition.

STATEMENT

A. The Board's Findings of Fact

During an organizational campaign in the spring and summer of 1966, the Union[1] advised the Company that employee Tellis Smith, who had been employed for 12 years in all departments, was active in the Union's campaign. When the representation election, which the Union lost, was held in August, Smith was a Union observer. (Pet. App. 15A; A. 108, 112–113, 120, 147, 202.)[2]

In April 1967, shortly before Smith was to enter the hospital, supervisor Nolin assured Smith that her job would be waiting for her (Pet. App. 15A–16A; A.

[1] The Cigar Makers International Union, AFL-CIO.

[2] "A." references are to the printed appendix to the briefs in the court below.

63–65, 109, 217). After the operation Smith telephoned Nolin and said she had been cleared by her doctor and was ready to return to work. Nolin first told her to report the following morning, Monday, June 6, but then informed her of the Company's new rules requiring a medical release (Pet. App. 16A; A. 110). When Smith reported to Nolin on Tuesday with such a release, Nolin observed that "there wasn't very much work," asked Smith if she would stay off during the vacation, and promised that she would be recalled thereafter (Pet. App. 16A; A. 110–111, 177). The same day, Smith talked to Charles Pursser, a supervisor for whom she had previously worked; he told her that she was a "good worker" whom he "would like to have * * * work for him" (Pet. App. 16A; A. 177, 178). When Smith presented her medical release at the office, she was told that she could not draw unemployment compensation because she was still on the payroll, but that the Company would call her about whether she could draw vacation pay (Pet. App. 16A–17A; A. 52–53, 111). Two days later the Company removed Smith from the payroll (Pet. App. 17A; A. 111, 174, 217).

On June 23, the Company closed for its two week vacation and 35 employees were laid off.[3] Pet. App. 16A, n. 5; A. 123–124, 163, 349). When the Company reopened on July 10, the Union renewed its organizational campaign and Smith, as a member of its organizing committee, attended union meetings, signed

[3] The Company customarily shut down for a vacation during its summer slack period (Pet. App. 16A, n. 5; A. 123, 50).

a new union card, and solicited cards from her former fellow employees (Pet. App. 17A, 22A; A. 112–113, 120–122). Near the end of July, Smith unsuccessfully sought reemployment (Pet. App. 19A; A. 39). About the same time, the Company hired a new stripper—a position which Smith had satisfactorily filled the previous fall—without offering her reemployment (Pet. App. 21A–22A; A. 70–71, 91–92, 217).

In August and September, the Company hired strippers and stripper-learners without calling Smith, and also filled other jobs that Smith had held (Pet. App. 22A; A. 69, 99, 143–144, 207–210). After Labor Day, Supervisor Pursser told Smith's husband that he would "like to have" her back at work but had been informed by the factory superintendent that the Company "wasn't going to hire any more girls right now" (Pet. App. 18A; A. 90–91). The same week, Pursser told some of the workers in his department that he "didn't know" when Smith was going to return but that "he'd be glad to have her back" (Pet. App. 19A; A. 71–72). Smith again sought reemployment on September 21, and was permitted to fill out a job application, but when she talked with Vice-President Goldstein a week later she was told the Company had no work (Pet. App. 17A; A. 111–112). On October 9, the Company hired Helen Chasen to perform the same job Smith had done just before her operation (Pet. 3; Pet. App. 21A; A. 143–145, 164).

During the fall of 1967, employee Frank Todd had "many" conversations with Supervisor Pursser in which Pursser asked whether specific employees were

"for the Union" and whether the Union was strong enough to "come in" (Pet. App. 15A; A. 70, 74–75). On November 1, 1967, the Union sent the Company a list of the members of its new organizing committee, which included Todd's name (Pet. App. 17A; A. 121). Todd, who had been on the 1966 committee but had not authorized the inclusion of his name on the new committee, was disturbed that "everybody acted very unfriendly" after the Union's notification and asked Pursser to find out about the list (Pet. App. 17A; A. 77, 202–203). Later that day, Eloy Vega, the Company's Vice-President and General Manager, told Todd that he had heard of his desire to withdraw from the committee. When Todd confirmed this and asked how to get off, Vega advised him to write the Union and ask it to strike his name (Pet. App. 18A; 77–78). Later Pursser discovered that he had not written the letter and told Todd that "Mr. Vega would be very, very unhappy" and would think that he was working for the Union (Pet. App. 18A; A. 78–79, 163).

B. The Decisions Below

On the above facts and the Company's contradictory explanation of its failure to recall Smith after July 10, 1967,[4] the Board, adopting the findings of the Examiner,

[4] At the rehearing conference, the Company stated that Smith had not been recalled because of her physical condition (Pet. App. 19A; A. 53–55). At the hearing, however, Company Vice-President Goldstein testified that Smith's physical condition had nothing to do with the failure to recall her, and that she had not been reemployed because Supervisors Pursser and Nolin complained about her work (Pet. App. 19A–

held that the Company failed to recall Smith because of her union activities, and thus violated Section 8(a)(3) of the Act (Pet. App. 9A, 22A). The Board, in agreement with the Examiner, also found that Purser's questioning of employee Todd about the Union's strength and the union adherence of specific employees was coercive, and that the Company thereby violated Section 8(a)(1) (Pet. App. 9A, 15A). The Board ordered the Company to cease and desist from these unfair labor practices and from in any other manner interfering with its employees' Section 7 rights, to offer reinstatement to Smith and make her whole for any pay loss suffered as a result of the discriminatory failure

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20A: A. 51). Company counsel then said Smith was not recalled due to lack of work (Pet. App. 20A: A. 92-93). On direct examination, Purser testified that he had criticized Smith for poor production "3 or 4 times a day" in 1967. But on cross-examination, he gave as the reason for hiring Helen Chasen instead of Smith on October 9 "his belief that Smith was still under medical care. He further testified that he had talked to Smith about poor production only "3 times" in 1967. (Pet. App. 20A-21A: A. 59-61, 161, 167-168; Tr. 75, 403-404). Nolin testified that she had talked to Smith "time and time again" about wasteful work (Pet. App. 20A: A. 140). Yet Nolin also admitted assuring Smith that her job would be waiting for her. And Purser's frequent statements that he would "like to have [Smith] back" were corroborated by disinterested witnesses (Pet. App. 16A, n. 4, 18A, n. 10, 21A: A. 63, 71, 72, 91-92). The Examiner credited Smith's "honest, forthright" denial that Purser and Nolin had ever criticized her work, noting that the supervisors were "singularly unimpressive" witnesses, and that their admitted favorable statements about Smith contradicted their alleged criticisms of her (Pet. App. 21A-22A).

The Board, contrary to the Examiner, additionally found that the Company violated Section 8(a)(3) by discriminatorily discharging employee James Townsend (Pet. App. 9A-10A). The court of appeals rejected this finding (Pet. App. 5A-6A) and it is no longer in issue.

to recall her, and to post appropriate notices (Pet. App. 11A, 28A–30A). The court of appeals held that the Board's findings and conclusions were supported by substantial evidence and enforced its order in relevant part (Pet. App. 5A–6A).

ARGUMENT

1. The Company's contention is that the Board's finding of discriminatory motivation respecting the failure to recall Smith rests on "inferences and conjectures" which totally disregard "the hard facts which indicate Petitioner's innocence" (Pet. 14). This presents only an evidentiary issue which does not warrant review by this Court, since the court of appeals concluded that the Board's finding "is supported by substantial evidence from the record as a whole" (Pet. App. 5A). *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491; *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, 408. Moreover, as shown by the facts summarized above, there is ample basis for the Board's finding.

2. The Company's second contention—that the Board found Purser's questioning of Todd coercive solely because of the Company's discriminatory failure to recall Smith (Pet. 14, 16–17)—misconceives the basis for the Board's conclusion. The Board's finding of coercion rests not only on the fact that the questioning occurred in the context of the Company's discriminatory failure to recall Smith, but also on the added facts that Purser had repeatedly questioned Todd about the Union and had asked him about

the Union allegiance of specific employees (Pet. App. 15A; see also Pet. App. 18A, n. 9). In these circumstances, the Board was justified in finding the interrogation coercive.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1970.

In *National Labor Relations Board* v. *Sunnyland Packing Co.*, 369 F. 2d 787, 789 (C.A. 5), cited by the court below (Pet. App. 5A), questioning one employee as to the union adherence of other employees was found to be coercive.

The Eighth Circuit cases cited by petitioner (Pet. 18–20) are factually distinguishable. The interrogation in those cases was not persistent and pointed, nor were the other unfair labor practices as related to the interrogation as was the interrogation here. Compare *McGraw Edison Co.* v. *National Labor Relations Board*, 419 F. 2d 67, 73 (C.A. 8).

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